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IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: LILA, J.A., MAIGE, J.A. And MASOUD J.A.)

CIVIL APPEAL NO. 201 OF 2023

COMMISSIONER GENERAL (TRA) ..... APPELLANT

VERSUS

COCA-COLA KWANZA LIMITED ..... RESPONDENT

(Appeal from the decision of the Tax Revenue Appeals Tribunal at Dar es Salaam)

(Mjemmas, Chairperson)

dated the 28th day of February, 2023

in

Tax Appeal No. 112 of 2021

JUDGMENT OF THE COURT

16th & 27th June, 2025

MAIGE, J.A.:

Having conducted a tax audit on the respondent's business affairs for the period from 2013 and 2014, the appellant issued a withholding tax certificate against the respondent (exhibit A1) for payment of TZS 158,756,970.33 as principal tax and interest accruing therefrom. Aggrieved, the respondent objected to the respective certificate as per exhibit A2, on among other grounds that, she was erroneously charged with withholding tax on services fees not taxable namely; consultancy services fees paid over the period between January and June 2013 (TZS

179,243,218) and security services fees (TZS 1,298,789,717) for the period between 2013 and 2014.

As a step towards determination of the objection, the appellant issued a proposal for settlement (exhibit A5) maintaining that fees for security services were taxable under the law and that; the complaint as to charge on consultancy fees for a period between January and June 2013 required concrete evidence in proof thereof. It, therefore, requested the respondent *"to avail necessary information including the list of invoice considered as wrongly treated and the Bank details to support the date of payment."* As part of her response, the respondent submitted, as per exhibit A6, SAP System Screen Dumps showing entries in Consultancy Fees General Ledger Account from January to June, 2013 and July to December, 2013; Trial Balance page for 2013 and 2014 purporting to show that the amount in question were for whole year and not for six months; and sample of invoices from suppliers which were paid from January to June 2013 as per the GL.

On 25th March, 2019, the appellant made a determination of the objection (exhibit A7) and reiterated its position that, *"security services are subject to withholding tax within the meaning of services of an independent business character"* and that, as the respondent had failed

to produce a list of bank details requested in the proposal, and, insofar as the sample invoices tendered covered only the lesser amount of TZS 15, 772, 000, the complaint as to withholding tax on consultancy fees for the period before July, 2013, had not been proved as well.

Upon the respondent's appeal to the Tax Revenue Appeal Board (the board), the appellant's determination of the objection was reversed and the board agreed with the respondent that security services do not fall under services of an independent business character as per the Withholding Tax Practice Note No. 1 of 2013 and that; through the financial statements and sample invoices and the detailed oral testimony of RW1 and RW2, the respondent had proved that the withholding tax amount charged covered the period before July 2013. On further appeal, the decision of the board was upheld by the Tax Revenue Appeal Tribunal (the tribunal) and hence, the current appeal.

In the memorandum of appeal, the appellant is faulting the tribunal for holding that: the Practice Note No. 1 of 2013 binds the appellant; the services of an independent business character are exhaustively listed in paragraph 5.2.1 of Practice Note No. 1 of 2013 which does not include Security Services; the evidence submitted by the respondent during objection was sufficient to prove that the appellant's

assessment of withholding tax for the period between 1st July and 31st December, 2013 was excessive and erroneous; and the appellant was wrong to impose interest because it is based on incorrect principal tax.

At the hearing of the appeal, the appellant was represented by Mr. Moses Kinabo, learned Principal State Attorney who was assisted by Ms. Juliana Ezekiel, learned Principal State Attorney, Mr. Colman Makoi and Mr. Andrew Kombo, both learned State Attorneys. The respondent was represented by Mr. Wilson Kamugisha Mukebezi and Mr. Norbert Mwaifwani, both learned advocates.

As per Rule 106 (1) and (8) of the Tanzania Court of Appeal Rules, 2009, both parties did, through their counsel, file the relevant written submissions which, at the hearing, were adopted to support their positions in the appeal with some clarifications. In the course of his oral arguments, however, Mr. Kinabo abandoned the first ground of appeal and we marked so. Gathering from the grounds of appeal and the rival submissions, the issue for determination are: whether private security services do not fall under *'other such services of an independent business character'* as per clause 5.2.1 of the Practice Note No. 1 of 2013 so as to be excluded from withholding tax liability in terms of section 83(1) (c) of the Income Tax Act (the ITA); whether the

respondent failed to prove that the appellant's withholding tax assessment for the period between 1st July 2013 to 31st December 2013 is excessive and erroneous; and whether the appellant was correct in imposing interest.

In address of the first issue, Mr. Kinabo faulted the tribunal in holding that, the list of the services in the Practice Notes No. 1 of 2013 were exhaustive. The statutory rule of interpretation *expressio unius est alterius,* he submitted, was incorrectly applied by the tribunal and the board because, by starting with the word "including" in the clause in question, the items of services specified therein served as merely examples and not exclusive of other services of the same class. To him, the guiding criteria under the clause is "other such services of independent business character" which did not exclude security services in as long as it was of the business character. He submitted further that, since the provisions of section 83(1) (c) of the ITA and Clause 5.2.1 of the Practice Note were clear and unambiguous, they should have, as per the principle in **Pan African Energy(T) Ltd v. Commissioner General (TRA)** (Civil Appeal No. 81 of 2019) [2020] TZCA 54 (6 March 2020, TANZLII) been strictly interpreted by using their plain and ordinary meaning. The relevant withholding tax, it was submitted, was

introduced by the Act and not the Practice Note No. 1 of 2013 which are only aids to statutory interpretation not binding to the court as per the principle in **Kilombero Sugar Company Limited v. Commissioner General Tanzania Revenue Authority**, Civil Appeal No. 218 of 2019, (unreported). It was concluded, therefore that, it was not correct for the tribunal to exclude private security services from the requirements of section 83 (1) (c) of the ITA.

In response, Mr. Mwaifwani submitted that, the tribunal was quite correct in excluding private security services from services envisaged in section 83(1) (c) as clarified in clause 5.2.1 of the Practice Note No. 1 of 2013. He assigned two reasons to support the proposition. In the first place, he submitted that by the rule of interpretation *expressio unius est clusio alterius'* which has been applied in a number of decisions including the case of **Pan Africa Energy** (supra), private security services being not of the same class with the services expressly mentioned in the respective provisions of the Practice Note, are implicitly excluded from the obligation imposed by the provisions of section 83(1) (c). In addition, he submitted, as services listed in the Practice Note are not followed by such expression as "any other services" or and "other services of the same nature", the list therein is exhaustive. In the

second place, he submitted, the fact that the law was amended in 2016 to include security services entails that security services were not, before the amendment, within the scope of the withholding tax in question.

We have very carefully followed the counsel's arguments on the issue. We agree with both counsel that the issue at hand revolves around the interpretation of section 83(1) (c) of the ITA which, before the amendment brought by Act No. 2 of 2016, provided as follows:

"83(1) Subject to subsection (2), a resident who-

(a) In conducting a mining business pays service fee to another person in respect of management or technical services provided wholly and exclusively for business;

(b) Pays to a nonresident an insurance premium with a source in the United Republic;

(c) pays to a resident or non-resident a service fee with a source in the United Republic; or

(d) pays money transfer commission to a money transfer agent;

shall withhold income tax from the payment at the rate provided for in paragraph 4 (c) of the First Schedule".

As can be seen, the above provisions generally referred to "*service fee with the source in the United Republic*" without any specification. Under the powers conferred to it by section 130(1) of the ITA (now repealed), however, the appellant issued, in 2013, a Practice Note No. 1 of 2013 for Withholding Tax Services Fees guiding and clarifying on the interpretation of the above clause. Of relevancy for the purpose of this decision, is paragraph 5.2.1 which provided as follows:

> *"The payment subject to withholding tax under this Practice Note is for service rendered by the recipient of the payment through a business of that person or a business of any other person. The* ***service fee should be for provision of professional or consultancy services or other such services of an independent business character i.e. other than remuneration for payment.*** *The services include* ***scientific, literacy, artistic, educational or training activities as well as activities of physicians, surgeon, lawyers, engineers, architects, surveyors, dentists, accountants and auditors". [****Emphasis added****]*

The position of the Practice Note in ascertaining provisions of the ITA was deeply considered in **Kilombero Sugar Company Limited v.**

Commissioner General (supra) where it was observed that though not binding to the court or tribunal, Practice Notes are external aids of construction providing guidance in the interpretation and are binding to the tax officers, including the appellant.

In the authority just referred, the Court was construing the provisions of section 83(1) (b) of the ITA as amended by Act No. 2 of 2016 which pertained to withholding tax on "a service fee or an insurance premium." The payment involved in the said case was costs incurred in rendering services to, and reimbursed by the appellant. Though section 83(1) (b) was silent on payment in the form of reimbursements, the Court guided by paragraph 10.0 of the Practice Note No. 01/2019 observed that reimbursement costs are part of service fee subject to withholding tax. The relevant part of the said Practice Note read:

> *"Where services are provided and payments are made to the witholdee in form of service fee and reimbursements then the withholding tax base will be the full amount that is service fee plus reimbursement amount".*

Back to the issue under scrutiny, it may be apparent that the expression "service fee" for the purpose of item (c) of subsection (1) of

section 83 of the ITA was clarified in the Practice Note No. 1 of 2013 as those which are "*for provision of professional or consultancy services or other such services of an independent business character".* That security services are neither professional services nor consultancy services has not been in dispute but whether the same falls under the expression *"other such services of an independent business character"* is that which is hotly contentious.

Mr. Kinabo has submitted, with all forces that, as the provision of section 83(1) (c) of the ITA is clear and unambiguous, the words "service fee" should be strictly construed and assigned its plain and ordinary meaning as per the principle in **Pan African case'** *supra*, they being in a tax statute. For the respondent, it was submitted that the respective rule of construction was inapplicable as the provisions were not clear on the nature of service fees in question.

For a start, we agree with the counsel for the appellant that, where a provision of the law is clear and unambiguous and more so, in construction of tax statutes, courts and tribunals are expected to use strict rule of interpretation. Such rule of interpretation, however, it is a settled principle of law, is inapplicable if the conclusion drawn therefrom would lead to absurdity. It will also not be applicable if its use has the

effect of rendering other words in the provisions of the statute superfluous. In that respect, the following commentary of the learned author D.N. Mathus in his **Interpretation of Statutes**, Fourth Edition, Central Law Publications, Allahabad-2, India, 2013, 78 may be pertinent:

> *"Legislature is not expected to have used any extra or surplus word in the language. It is presumed that every word has been inserted at a proper place with a definite object and as such, none of the words can be ignored while construing a provision. Legislature is deemed not to waste its words or to say anything in vain and there is an intention to give effect to every word. The result of this presumption is that the court is prevented from considering any word or expression as superfluous and rejecting it on this ground in the course of interpretation".*

Admittedly, the phrase "service fee" in its plain and ordinary meaning, would cover fee from security service. In the manner it was used in the provisions of section 83(1) of the ITA, however, it could not be assigned such a meaning without leading to absurdity and/ or rendering the words in other items of the subsection superfluous. Item (c) was among the four items in the provision of the said subsection.

Each of the items provided for a specific service fee. Item (b) provided for fee on management or technical service in mining business. Item (b) provided for fee on insurance premium while item (d) covered commission from money transfer. In the absence of specification, therefore, items (a) and (d) would fall under service fee paid to a resident or non-resident, and item (b) would fall under service fee paid to a non-resident alone. It would follow, therefore that, the "service fee" as used in the item under discussion was not intended to mean any "service fee" but a specific kind of service fee other than those which are specified in other items of the subsection. It is certainly because of that reason that the Practice Note was issued to guide and clarify on the scope of the respective service charge. To construe it otherwise, would render the provision of subsection (1) of section 83 as it was before 2016 amendment inconsistent. It would on top of that, render the other items in the subsection superfluous. It is on the foregoing reasons that, we dismiss the contention.

Still on the same issue, it has been submitted that "security service" is well captured in the expression "other such services of an independent business character" in clause 5.2.1 of the Practice Note No. 1 of 2013 and that, the rule *expressio unius est clusio alterius* had been

incorrectly applied by the board and the tribunal. As it is apparent from the record, the decision of the board on this issue which was confirmed by the tribunal was that, since security service is not among the items of services listed in the Practice Note, it could not be implied from the expression "other such services of independent business character." Truly, in construing the provision, the board and the tribunal used the rule *expressio unius est clusio alterius*. Much as we agree with Mr. Kinabo that the services enumerated in the last part of clause 5.2.1 inso far as they were preceded by the word "including", were not exhaustive, it is our view that, since the words "other such services of an independent business character" is a general phrase preceded by specific phrases 'consultancy services' and 'professional services' which in our view are of the same kind or genus, by the rule of *ejusdem generis*, the meaning of such general phrase has to be limited to that class or category only. Therefore, in **A.G. v. Brown** [1920] 1 KB 772 where the clause in the statute involved was "*arms, ammunition or gun powder or any other goods*", it was held that the words "any other goods" should be construed to mean goods similar to arms and ammunition or gun powder.

Inspired by the above principle, therefore, it is without any doubt that, since the phrase "security services" is neither similar to professional services nor consultancy services, the general phrase "other such services of an independent character" cannot be construed to mean security service. Besides, even by ordinary language, the phrase "other such" when used in a sentence signifies "other things or people of the same kind" or "other similar thing." [See Cambridge Dictionary, http://disctionary. cambridge. org /dictionary /english /such]. On that account, therefore, we agree with the concurrent conclusion of the board and the tribunal that, in the absence of express inclusion, security service cannot be implied from the said general phrase. They do not as well fall under any of categories of services specified in the last part of clause 5:2:1 of the Practice Note No. 1 of 2013.

On that account, therefore, we agree with the concurrent conclusion of the board and the tribunal that, in the absence of express inclusion, security service cannot be implied from the said general phrase. They do not as well fall under any of categories of services specified in the last part of clause 5:2:1 of the Practice Note No. 1 of 2013.

It is our decided view, therefore, that the first ground of appeal is without merit and it is hereby dismissed.

We proceed with the second issue as to whether the respondent did not adduce during objection, sufficient evidence to establish that the amount of the withholding tax charged for the period of 2013 and 2014 was erroneous and excessive. In his submission, Mr. Kinabo blames both the board and the tribunal for wrongly evaluating the evidence in exhibits R1 and A7 and came into a concurrent finding that the withholding tax in question incorporated payments for services rendered in the period between January and June, 2013 despite that the respective exhibits did not show any payment of consultancy service fees in respect of that particular period. He submitted further that, although the respondent was requested, as per exhibit A-5, to avail all necessary evidence including the list of invoices considered as wrongly treated, the respondent only produced three invoices worth TZS 15,772,000 which only justified partial amount of the withholding tax in dispute. She did not as well, produce a list of bank payment details, as per the request in the said exhibit, he further submitted. In his contention, therefore, as there was no evidence to prove that the alleged services were rendered to the respondent in the period between

January and June, 2013, the respondent failed to discharge the burden of proof as required under section 18(2) (b) of the Tax Revenue Appeals Act (the TRAA).

In rebuttal, Mr. Mwaifwani doubted, in the first place the maintainability of this ground of appeal, arguing that, it is a pure point of fact which was determined at the first incidence by the board and eventually upheld by the tribunal on appeal. In Mr. Mwaifwani's contention, under section 25(1) of the TRAA, the decision of the tribunal in that respect was final and conclusive.

In response to this issue, Mr. Kinabo submitted that the ground in question insofar as it pertains to failure to asses evidence was a pure point of law as per the principle in **Atlas Copco Tanzania Ltd v. Commissioner General, Tanzania Revenue Authority** (Civil Appeal No. 167 of 2019) [2020] TZCA 317 (17 June 2020, TANZLII) to the effect that; "*a question on a conclusion arrived at by the Tribunal where there is failure to evaluate the evidence or if there no evidence to support it or that it is so perverse or illegal that no reasonable tribunal would arrive at.*" He submitted further that failure to discharge a burden of proof is a pure point of law. He, therefore, urged us to step into the shoes of the tribunal and reappraise the evidence.

We agree with Mr. Mwaifwani that, in accordance with section 25(2) of TRAA, an appeal to the Court from the decision of the tribunal would only lie on matters involving questions of law. As to what does it mean by matters involving questions of law, we said, in **Atlas Copco v. Commissioner General (TRA)** supra that:

> *"Thus, for the purpose of section 25(2) of the TRAA, we think, a question of law means any of the following:* ***first,*** *an issue on the interpretation of a provision of the Constitution, a statute, subsidiary legislation or any legal doctrine on tax revenue administration.* ***Secondly,*** *a question on the application by the Tribunal of a provision of the Constitution, a statute, subsidiary legislation or any legal doctrine to the evidence on record.* ***Finally,*** *a question on a conclusion arrived at by the Tribunal where there is failure to evaluate the evidence or if there no evidence to support it or that it is so perverse or so illegal that no reasonable tribunal would arrive at it".*

The contention of Mr. Kinabo in effect is that there was failure on the part of the board and tribunal to evaluate the evidence. That would, if established, amount to a question of law within the ambit of the

provision of section 25(2) of the TRAA as judicially considered in the authority just referred.

We note that, the ground in question arose from the respondent's third ground in her appeal before the board. It was to the effect that the appellant had improperly included payment for consultancy fees for the period between January and June, 2013. Like here, the main issue involved was whether sufficient evidence was adduced by the respondent to establish that the appellant's computation of withholding tax on consultancy services, included amount which were paid during the respective period when withholding tax on local services was not chargeable. As per page 364 of the record, the board started by remarking as follows:

> *"Looking at the evidence on the record, we find it not in difficult to determine the values of consultancy services procured by the appellant between 1st July 2013 and 31st December 2014. This is evidenced by the appellant's ledger and invoices which the respondent had access during the audit and objection determination. It appears, therefore that, the occurrence of payments are not relevant".*

Having remarked so, the board proceeded to determine the alleged payments for consultancy services supplied to the respondent between January to June 2013 in line with the appellant's contention that, no bank statements were provided to prove the amount. Guided by the definition of the term "payment" as per section 3 of the ITA, the board observed that, the issue of bank statements would relate to actual payments for services procured, and that, as a matter of law, payments follow the invoice and not otherwise. It concluded in respect to omission to produce bank statements, therefore that, once the invoices for services are booked in accounts, they are treated as expenses incurred which determines the taxable income. After addressing itself on relevant principles of law, as afore stated, the board evaluated the evidence and concluded on the third ground as follows:

> *"In the instant appeal, as evidenced by AW1 and admitted by RW1 and RW2, the respondent raised the tax audit queries from the accounts and source documents of the appellant. The appellant, as evidence in Exhibit R-1, A-5 and A-6, and as per the evidence of RW1 and RW2, availed to the respondent a detailed analysis of expenses incurred, together with invoices, trial balance, larger extracts, audited financial*

statements and final returns. Thus, in terms of the evidence adduced before us which we are satisfied that, the respondent had access during the audit and objection determination, the respondent is not justified to argue that, the appellant failed to submit evidence or wrongly treated payments and bank statement. In principle, the respondent's tax auditors are obliged to verify the source documents before establishing correct tax liabilities. In other words, whatever is observed or detected or seen audited financial statements and accounts is required to be verified by each audit team with source documents. It appears to us that, and we have no doubt that, the tax auditors left part of the job (of verifying source documents) to the respondent's officials who dealt with the objection determination. With that analysis, we unanimously find that, the appellant sufficiently substantiated its claims of the respondent's inclusion, in its calculation of withholding tax, of payment of service fees related to consultancy services supplied to the appellant for the period from January to June 2013".

In the appeal to the tribunal, the complaint in question was raised as a third ground where it was alleged that "*the Board erred in law and fact in failing to examine the evidence of computation submitted by the appellant during hearing and holding that, the appellant's act of charging withholding tax on payments in respect of consultancy services supplied to the respondent in the following the year of income 2013 was not justified.*" Notably, in the said ground, the principle of law on the basis of which the board used to evaluate the evidence as aforestated was not doubted. We note that, in its decision, the tribunal, having gone through the judgment and proceedings of the board, satisfied itself that, the appellant's evidence were evaluated and the board correctly held that the evidence submitted by the respondent during the objection was sufficient to prove that the appellant's assessment was excessive and erroneous.

The issue raised in the third ground of appeal before us is not that the board did not asses the evidence but that, it did not properly asses the same in that, the evidence in the financial statements tendered as well as the invoices did not prove the assertion. This, we have no doubt, is a pure point of fact with no specification whatsoever of any point of

law involved. Dealing with more or less a similar issue we said in **Atlas case** (supra) that:

> *"In so far as tax appeals to the Court are concerned, an intending appellant must specify the grounds of law upon which the decision appealed against is objected in terms of section 25(2) of the TRAA. He must specify the points of law which are alleged to have been wrongly decided. It should be emphasized that, in an appeal from the Tribunal, matters of law must be evident on the face of the Memorandum of Appeal".*

From what we have discussed herein above, we are of the view that, the third ground of appeal constitutes a pure point of fact which as per the provisions of section 25(2) of the TRAA, cannot be a subject of appeal to the Court and, it is hereby dismissed. As the finding of the tribunal that the appellant wrongly imposed the withholding tax in dispute has not been disturbed, the last ground as to the correctness or otherwise of the interest thereon imposed, is bound to fail and, it is hereby dismissed.

All in all, we find the appeal devoid of any merit and it is dismissed in its entirety. In the circumstances of this case, we shall not give an order as to costs.

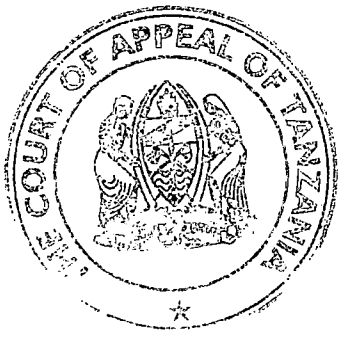
DATED at **DODOMA** this 27th day of June, 2025.

S. A. LILA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

Judgment delivered this 27th day of June, 2025 in the presence of Mr. John Mwacha, learned State Attorney for the Appellant and Mr. Nobert Mwaifwani, counsel for the Respondent, through video link, is hereby certified as a true copy of the original.



A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL